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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
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11 WENDELL STACY ELAM,)
12)
13 Plaintiff(s),)
14)
15 v.)
16 KAISER FOUNDATION HEALTH)
17 PLAN, et al.,)
18 Defendant(s).)
19 _____)
20)

No. C05-4179 BZ

**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S
CROSS-MOTION FOR SUMMARY
JUDGMENT**

21 Before the court are motions filed by defendants OPEIU
22 Local 29 (the "Union") and Kaiser Foundation Health Plan, Inc.
23 ("Kaiser") seeking summary judgment in this action arising
24 from pro se plaintiff Wendell Elam's termination from his job
25 and subsequent National Labor Relations Board ("NLRB")
26 decisions and arbitration award upholding his termination.¹ A
27 hearing was scheduled for September 6, 2006, but having
28 received no opposition from plaintiff, the court continued the

27 ¹ All parties have consented to my jurisdiction
28 pursuant to 28 U.S.C. § 636(c) for all proceedings, including
entry of final judgment. See Joint Case Management Conference
Statement and the Union's consent. [docket ## 25, 29]

1 hearing to September 20, 2006 and extended the deadline for
2 plaintiff to file an opposition. The court also cautioned
3 plaintiff that he could not rely on the allegations in his
4 second amended complaint and that he must set out specific
5 facts in declarations, depositions, answers to interrogatories
6 or authenticated documents. [docket ## 70 and 71] With his
7 consolidated opposition to both summary judgment motions,
8 plaintiff has filed a cross-motion for summary judgment.²

9 Plaintiff did not file any declarations in opposition to
10 the summary judgment motions or in support of his cross-
11 motion. His separate statement of facts relies on
12 declarations filed by defendants or documents not filed in the
13 record.³ The court has reviewed the record independently and
14 taken some of plaintiff's facts from his affidavit filed with
15 his opposition to defendants' motions to dismiss [docket # 17]
16 and the transcript of the arbitration proceedings filed as an
17 exhibit in defendants' papers for their motions to dismiss
18 [docket # 12]. From these documents and plaintiff's
19 deposition transcripts attached to defendants' declarations in
20 support of their summary judgment motions, the court has

22 ² Defendants' objections to plaintiff's cross-motion on
23 the grounds that it does not comply with my standing order and
24 has not been properly noticed are **OVERRULED**, and the court will
consider plaintiff's cross-motion.

25 ³ Defendants' objections to plaintiff's separate
26 statement of facts are **OVERRULED**. Although the court orders
27 meeting and conferring among the parties to file a joint
28 statement of facts, plaintiff may file a separate statement, as
both the Union and Kaiser have done, regardless of his alleged
agreement as to certain undisputed facts, and the court will
excuse plaintiff's untimely filing this one time. A statement
of facts does not constitute evidence unless supported by
declarations or other authenticated documents in the record.

1 gleaned the following material facts as viewed in the light
2 most favorable to plaintiff.⁴

3 Plaintiff is a former employee of Kaiser and a former
4 member of the Union. He worked as a Medical Claims Examiner
5 in Kaiser's Northern California Claims Administration office
6 in Oakland, California intermittently for 11 years. Jenny
7 Lam, plaintiff's co-worker, alleged in March 2003 that
8 plaintiff was sexually harassing her. The parties agree that
9 Lam's sexual harassment complaint arose because plaintiff had
10 sent Lam flowers, forwarded an email he sent to his cousin
11 describing his feelings for Lam⁵ and requested a co-worker to
12 ask Lam if she would like to listen to a CD with music played
13 by plaintiff.⁶ Lam had expressed her discomfort with
14 plaintiff's actions, stating that she was happily married.⁷

15
16 ⁴ All parties have filed evidentiary objections.
17 Plaintiff claims in his opposition that defendants' papers
18 contain hearsay. Defendants' objections to plaintiff's
19 opposition and his statement of facts are based in part on
20 plaintiff's alleged misstatements of evidence or lack of
21 evidence. The parties' objections are **OVERRULED**. Plaintiff's
22 objections are vague and do not specifically point to which of
23 defendants' statements he claims are hearsay. To the extent
24 that any of defendants' objections are valid, they go to the
25 weight I attach to the evidence.

26 ⁵ In his email, plaintiff stated he was "kinda falling
27 in love" with Lam, that "[he had] been noticing her for 3yrs
28 now" and that he did not know if "[he] can deal with . . . BUT
IT'S TOO MUCH EMOTION." Schwartz Decl., Exh. A., Exh. 1.
Plaintiff does not dispute that he wrote this email and
forwarded it to Lam.

⁶ Plaintiff seems to have believed that Lam would
welcome his attentions because "[he] felt that she was
flirting" and he "would notice her looking over toward [him]." Schwartz Decl., Exh. A., page 47.

⁷ Prior to giving her flowers, plaintiff spoke to Lam
on two limited occasions other than saying hello in passing.
Once he wrote a medical record number on a post-it note and

1 There was no question that plaintiff knew that his attentions
2 made Lam uncomfortable and she requested he cease giving her
3 romantic notes or making romantic gestures.⁸ After two
4 meetings to discuss Lam's complaint, Kaiser instructed
5 plaintiff to communicate with Lam only for work-related
6 reasons. Kaiser did not otherwise discipline plaintiff. In
7 May 2003, plaintiff filed a charge against the Union with the
8 NLRB, alleging breach of the Union's duty of fair
9 representation, in part based on the conduct of Shop Steward
10 Sheila Wiltz, who was representing Lam at the second meeting.⁹
11 The Union president represented plaintiff at the second
12 meeting.

13 On June 5, 2003, plaintiff telephoned Lam. He claims he
14 wanted to talk about a work-related matter because he wanted
15

16 _____
17 handed it to Lam and another time he gave her an umbrella at
18 the request of one of their co-workers.

19 ⁸ Plaintiff testified at his deposition that Lam
20 responded to his email, "I'm married, and I - this will be our
last correspondence, and I know you can respect that." Hwang
Decl., Exh. A 42:18-20.

21 ⁹ By letter dated July 31, 2003, a regional director of
22 the NLRB informed plaintiff that it would not proceed with his
charge against the Union. The regional director found that the
23 evidence did not support plaintiff's claims and that the Union
had not breached the duty of fair representation or based its
24 decisions on arbitrary, invidious or discriminatory reasons.
The regional director found that Wiltz was reasonably trying to
25 protect Lam and also indirectly plaintiff at the March 2003
meeting, that the stewards were acting in their capacity as
26 individual employees rather than on behalf of the Union by
informing Kaiser of plaintiff's early arrival and manner of
27 service of his NLRB charge and that Whitehead was supporting
Lam by informing Kaiser of plaintiff's voicemail message
28 because it was similar to the conduct for which plaintiff had
previously been warned. Schwartz Decl., Exh. A., Exh. 4.
Plaintiff did not appeal this decision.

1 to discuss the last disciplinary meeting.¹⁰ Lam interpreted
2 the call to be personal and complained to the department
3 manager, Oliver Hopkins. Lam and Hopkins felt the call
4 violated Kaiser's instruction to plaintiff to communicate with
5 Lam only for work-related reasons, and on June 6, 2006,
6 Hopkins sent an email scheduling a meeting on June 9, 2006 to
7 discuss plaintiff's call to Lam. See Hwang Decl., Exh. A,
8 Exh. 5. On June 11, 2006, plaintiff served Wiltz with his
9 NLRB charge by mailing her a copy at work. On June 14, 2006,
10 he left a voicemail for Shop Steward Yvonne Whitehead offering
11 a resolution to both his NLRB charge and Lam's sexual
12 harassment charge against him.¹¹

13 Plaintiff claims he had trouble finding satisfactory
14 Union representation, and the June 9, 2006 meeting was
15 continued until June 16, 2006. Plaintiff again showed up
16 without a representative, and the meeting was re-scheduled,
17

18 ¹⁰ Plaintiff claims that he asked, "Are you working this
19 weekend? Because I wanted to ask you a question about my last
disciplinary meeting." Hwang Decl., Exh. A 71:20-22.

20 ¹¹ Plaintiff's voicemail message, transcribed and
21 included in the last chance agreement, is as follows:

22 "Hi Yvonne; its Wendell. Um ... listen, I ... I
23 been thinking. Um ... You know I've got a DR ...
24 a DFR [NLRB charge] filed. Um, maybe there is
25 some kind of a compromise that we can come to,
26 before this goes too far ... Um, say, for example,
27 perhaps Jenny might want to drop her charges
28 against me and then I might want to drop my
charges against Sheila [Wiltz] and the Union, I
don't know. If that's ... if that's something
that can be discussed. Um ... If you want to ask
Jenny [Lam] if she wants to do that, I'd be open
to discuss that. Um ... That's why I'm calling.
And I'll talk to you later."

1 with Hopkins informing plaintiff that the next meeting would
2 occur regardless of whether plaintiff had a representative.
3 On June 17, 2003, Hopkins proceeded with the meeting despite
4 plaintiff's lack of Union representation by a person of his
5 choice. Plaintiff did have Union representation with the
6 presence of vice president and business representative Geoff
7 Gamble at all meetings after March 20, 2003. At the June 17,
8 2003 meeting, Kaiser placed plaintiff on a paid investigatory
9 suspension for three days while it considered how best to
10 resolve the situation. Because Kaiser believed plaintiff had
11 continued to violate its instructions regarding Lam, Kaiser
12 placed plaintiff on a Level 4 last chance agreement. On June
13 20, 2003, after his return from his suspension, plaintiff
14 signed a last chance agreement, which prohibited contact with
15 Lam for any reason for one year from the date plaintiff signed
16 the agreement. Plaintiff claims that he signed the last
17 chance agreement under duress because he believed he would
18 lose his job if he did not sign it. In July 2003, plaintiff
19 and the Union grieved the investigatory suspension and the
20 last chance agreement, arguing that such acts constituted
21 "unjust discipline" in violation of Kaiser's policy of
22 progressive discipline.¹² In October 2003, at a meeting to
23 discuss the grievance, plaintiff challenged the lawfulness of
24 the last chance agreement. After the meeting, based on Gamble
25 asking, "What do you think? January?" and the participants

26
27 ¹² The Union argued that since Kaiser had not
28 disciplined plaintiff in any previous meetings, to discipline
him for the first time by suspending him and imposing a last
chance agreement was unjust.

1 all nodding their heads, plaintiff "was under the impression
2 that an agreement was made orally modifying the length of the
3 [last chance agreement] from the original expiration date of
4 June 5 2004 [sic] to the new expiration date of January 5,
5 2004," Second Amended Compl. 17:27-20, although he concedes
6 that no such agreement was made in writing and no explicit
7 discussion or confirmation occurred at the October 2003
8 meeting. On two separate occasions thereafter, plaintiff
9 claims Wiltz told him that the terms of the last chance
10 agreement would expire or had expired in January 2004. On one
11 occasion, in January 2004, plaintiff was complaining that his
12 supervisors continued to monitor his desk when he was not
13 present, although he thought the last chance agreement had
14 expired, and Wiltz told him not to worry about it. Plaintiff
15 took this to mean that Wiltz was confirming that the last
16 chance agreement had been modified.

17 On February 10, 2004, several Kaiser employees, including
18 plaintiff and Lam, attended the funeral of a co-worker. After
19 the funeral, plaintiff emailed Lam. Plaintiff does not
20 dispute this but insists that he was allowed to do so since he
21 thought the last chance agreement was no longer in effect.¹³
22 Because of his contact with Lam, which Kaiser determined to be
23 a violation of the last chance agreement, Kaiser fired
24 plaintiff on February 24, 2004. Plaintiff and the Union
25 subsequently grieved the termination. Gamble prepared the

26 ¹³ Even if he believed the last chance agreement was no
27 longer in effect, it was clear that Lam did not want plaintiff
28 to contact her for personal reasons. In light of the history
between the two, plaintiff's email to Lam seems unwise at best
and harassing at worse.

1 grievance for plaintiff. The parties combined plaintiff's
2 grievances regarding the last chance agreement and his
3 termination, and at a March 2004 meeting to discuss
4 plaintiff's grievances, Gamble represented plaintiff, arguing
5 that plaintiff's June 2003 call to Lam was work-related, and
6 thus, the last chance agreement and plaintiff's termination
7 were unwarranted. Kaiser did not change its view of its
8 earlier decisions.

9 On March 23, 2004, plaintiff filed a lawsuit against
10 Hopkins, later substituted by Kaiser, in Small Claims Court in
11 Alameda County, alleging "6/10/03 - Harassment, libel and
12 retaliation for having filed a complaint with NLRB leading to
13 unjust termination of my employment (2/25/04)." The Small
14 Claims Court judge ruled in plaintiff's favor and awarded him
15 \$500.

16 In March 2005, a three-person arbitration panel heard
17 plaintiff's consolidated grievances. The Union provided
18 plaintiff with the benefit of counsel, Leonard Carder LLP, and
19 plaintiff testified at the arbitration. His counsel cross-
20 examined Kaiser's witnesses and made objections. See Gamble
21 Decl. in support of motion to dismiss, Exh. F. [docket # 12]
22 In a decision dated April 6, 2005, the arbitrator upheld both
23 the termination and the imposition of the last chance
24 agreement. The arbitrator rejected plaintiff's contention
25 that the last chance agreement had been modified to end in
26 January 2004, finding no support in the record for such
27 modification. The arbitrator found the last chance agreement
28 to be enforceable, and that Kaiser had just cause to terminate

1 plaintiff in February 2004 when he violated the last chance
2 agreement by contacting Lam. Plaintiff did not move to vacate
3 the arbitration decision.

4 On May 5, 2005, plaintiff filed a second charge with the
5 NLRB, alleging that the Union and its representatives failed
6 to represent him for arbitrary reasons. By letter dated June
7 15, 2005, a regional director of the NLRB refused to issue
8 complaint on this charge. The regional director found any
9 charge regarding the negotiation or signing of the last chance
10 agreement untimely. He further found that insufficient
11 evidence supported plaintiff's claim that the last chance
12 agreement had been modified and that the Union had satisfied
13 its duty of fair representation by pursuing plaintiff's
14 grievances to arbitration and providing an attorney to
15 represent him at the arbitration proceedings. Hwang Decl.,
16 Exh. A, Exh. 21. The NLRB dismissed plaintiff's appeal from
17 this decision in July 2005. Id. at Exh. 22.

18 On October 14, 2005, Elam filed this action. His second
19 amended complaint alleges several claims including
20 retaliation, breach of the collective bargaining agreement and
21 breach of the Union's duty of fair representation. Plaintiff
22 contends that Kaiser and the Union are liable for retaliating
23 against him for his protected Union activity and disciplining
24 and terminating him under the pre-text of sexual harassment.¹⁴

26 ¹⁴ Plaintiff claims that his call to Lam in June 2003
27 was work-related as well as protected Union activity.
28 Plaintiff also asserts that Kaiser suspended him, placed him on
a last chance agreement and fired him in retaliation for filing
a charge with the NLRB, and defendants' proffered reasons, that
he violated instructions not to contact Lam, are pre-textual.

1 Plaintiff also argues that the Union discriminated against him
2 by failing to provide fair representation. Plaintiff further
3 asserts that defendants infringed upon his First Amendment
4 right to free speech by disciplining him for communicating
5 with Lam, and plaintiff also seems to seek damages for
6 defamation and economic injury in wrongful termination, common
7 law breach of contract, fraud and breach of the covenant of
8 good faith and fair dealing. He seeks injunctive relief,
9 including reinstatement, punitive damages and "any relief
10 applicable under the Civil Rights Act of 1991" as well as
11 damages, including back pay and benefits. Second Amended
12 Compl., Prayer.

13 Kaiser and the Union have moved for summary judgment
14 primarily on the grounds that plaintiff's claims are barred by
15 res judicata because of the judgment in the Small Claims
16 Court, are pre-empted by the National Labor Relations Act
17 ("NLRA"), 29 U.S.C. §§ 157, 158, or the Labor Management
18 Relations Act ("LMRA"), 29 U.S.C. § 185(a), and/or unsupported
19 by any evidence in the record.

20 Summary judgment is appropriate when there is no genuine
21 issue as to any material facts and the moving party is
22 entitled to judgment as a matter of law. Fed. R. Civ. P. 56.
23 There is no genuine issue of material fact where "the record
24 taken as a whole could not lead a rational trier of fact to
25 find for the non-moving party." Matsushita Elec. Indus. Co.
26 v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving
27 party need not produce admissible evidence showing the absence
28 of a genuine issue of material fact when the non-moving party

1 has the burden of proof, but may discharge its burden simply
2 by pointing out that there is an absence of evidence to
3 support the non-moving party's case. See Celotex Corp. v.
4 Catrett, 477 U.S. 317, 324-325 (1986). Once the moving party
5 has done so, the non-moving party must "go beyond the
6 pleadings and by her own affidavits, or by the depositions,
7 answers to interrogatories, and admissions on file, designate
8 specific facts showing that there is a genuine issue for
9 trial." Id. at 324. When determining whether there is a
10 genuine issue for trial, "inferences to be drawn from the
11 underlying facts . . . must be viewed in the light most
12 favorable to the party opposing the motion." Matsushita, 475
13 U.S. at 587. Although the parties have filed cross motions,
14 where required, the court has viewed the facts in the light
15 most favorable to plaintiff.

16 Defendants argue that res judicata bars all of
17 plaintiff's claims. A judgment for plaintiff in Small Claims
18 Court, a forum he chose, bars all claims which sufficiently
19 received due argument and consideration in that court. Pitzen
20 v. Superior Court, 120 Cal.App.4th 1374, 1381 (Cal. Ct. App.
21 2004). See Sanderson v. Niemann, 17 Cal.2d 563, 573 (1941);
22 Rosse v. DeSoto Cab Co., 34 Cal.App.4th 1047, 1052 (Cal. Ct.
23 App. 1995). At oral argument, plaintiff conceded that his
24 retaliation and defamation claims were adjudicated in Small
25 Claims Court; res judicata bars these claims from being re-
26 litigated in this court. Res judicata may bar other claims as
27 well, but the court will also address these and plaintiff's
28 retaliation and defamation claims on the merits. As discussed

1 below, in addition to the res judicata bar, plaintiff's claims
2 do not survive summary judgment on other grounds.

3 Many if not all of plaintiff's claims are pre-empted by
4 Sections 7 and 8 of the NLRA, which pre-empt unfair labor
5 practice claims based on activity arguably protected or
6 prohibited by the NLRA. Int'l Longshoremen's Ass'n, AFL-CIO
7 v. Davis, 476 U.S. 380, 381, 394 (1986). Congress granted
8 exclusive original jurisdiction over activity subject to
9 Sections 7 or 8 of the NLRA to the NLRB. Kaiser Steel Corp.
10 V. Mullins, 455 U.S. 72, 83 (1982). The NLRA pre-empts
11 plaintiff's claims that he suffered harassment or retaliation
12 for engaging in what he claims is protected Union activity,
13 such as calling Lam, or filing his NLRB charge. Moreover,
14 Section 301 of the LMRA pre-empts all state law causes of
15 action if evaluation of the causes of action would require
16 interpretation or analysis of the collective bargaining
17 agreement. Caterpillar, Inc. v. Williams, 482 U.S. 386, 394
18 (1987). Miller v. AT & T Network Sys., 850 F.2d 543, 545 (9th
19 Cir. 1988). Therefore, to the extent that the NLRA and the
20 LMRA pre-empt any of plaintiff's claims for retaliation or
21 breach of the collective bargaining agreement and any of his
22 state law claims for wrongful termination, common law breach
23 of contract or breach of the covenant of good faith and fair
24 dealing, defendants' motions for summary judgment on these
25 claims are **GRANTED** and plaintiff's cross-motion for summary
26 judgment is **DENIED**.

27 Although many of plaintiff's claims are not properly
28 before me since the NLRA or LMRA pre-empts them, in an

1 abundance of caution, I will consider these claims on the
2 merits. Plaintiff's retaliation, wrongful termination and
3 breach of the collective bargaining agreement claims are also
4 motions to vacate the arbitration decision dated April 6,
5 2005.¹⁵ A court will not examine the merits of a dispute
6 which the parties have submitted to arbitration under an
7 agreement to be bound by the award. Ficek v. Southern Pacific
8 Co., 338 F.2d 655 (9th Cir. 1964), *cert. denied*, 380 U.S. 988
9 (1965). "[I]f, on its face, the award represents a plausible
10 interpretation of the contract in the context of the parties'
11 conduct, judicial inquiry ceases and the award must be
12 affirmed." Holly Sugar Corp. v. Distillery, Rectifying, Wine
13 & Allied Workers International Union, AFL-CIO, 412 F.2d 899,
14 903 (9th Cir. 1969). The arbitration award should not receive
15 deference if the decision does not draw its essence from the
16 contract and the arbitrators dispensed their own brand of
17 industrial justice, the arbitrators exceeded the boundaries of
18 issues submitted to them, or the award is contrary to public
19 policy. See Federated Dep't. Stores v. United Foods &
20 Commercial Workers Union, Local 1442, 901 F.2d 1494, 1496 (9th
21 Cir. 1990).

22 The arbitration occurred on March 15, 2005, from 1:00
23 p.m. until 4:45 p.m., and plaintiff had adequate legal
24

25 ¹⁵ Defendants argue that the statute of limitations bars
26 plaintiff's attempts to vacate the April 6, 2005 arbitration
27 award. Plaintiff filed his complaint in this action in October
28 2005, well past the 100-day limitations period. San Diego
County District Council of Carpenters of the United Brotherhood
of Carpenters & Joiners of America v. Cory, 685 F.2d 1137 (9th
Cir. 1982). Therefore, I conclude plaintiff's attempt to
vacate the arbitration award is untimely.

1 representation, counsel who made the same arguments during the
2 arbitration proceedings as he makes now. Plaintiff's counsel
3 discussed each of the incidents of contact between plaintiff
4 and Lam, and she argued that plaintiff in good faith believed
5 that the June 5, 2003 call to Lam, which led to the Level 4
6 last chance agreement, was work-related because he wanted to
7 discuss his NLRB charge. She also argued that plaintiff's
8 voicemail to Whitehead was not an extortion attempt but an
9 effort by plaintiff to resolve the disputes informally, and
10 she elicited plaintiff's testimony that he contacted Lam after
11 their co-worker's funeral in the belief that the last chance
12 agreement had been modified. Reading the transcript of the
13 arbitration proceedings, I find that plaintiff had a full
14 opportunity to offer evidence and present his case.

15 The arbitrator found that the last chance agreement was
16 enforceable and that "[plaintiff's] claim [that there was a
17 verbal agreement to end the last chance agreement in January
18 2004] is not supported by the record" since "[h]is testimony
19 is contradicted by two management witnesses, and no
20 documentation was offered to demonstrate that the term of the
21 written chance agreement had been modified." Schwartz Decl.,
22 Exh. A, Exh. 19. She also found that the collective
23 bargaining agreement "does not require [Kaiser] to complete
24 every disciplinary step before seeking termination of an
25 employee" and that plaintiff's continued contact with Lam
26 despite repeated instructions not to do so justified Kaiser's
27 action in imposing the last chance agreement. Id. Further,
28 she noted that the Union and Kaiser negotiated the last chance

1 agreement, with plaintiff's participation, and "[n]othing in
2 the record suggests that it was imposed unfairly or without an
3 opportunity for input from the Union and [plaintiff]." Id.
4 The arbitrator concluded that "[b]ecause [plaintiff] ignored
5 repeated warnings about continuing to harass [Lam], management
6 had just cause to discharge [plaintiff]." Id.

7 None of the exceptions to challenge an arbitration award
8 exist in this case. Analyzing the award under the appropriate
9 standard, I find the arbitrator considered plaintiff's
10 retaliation, wrongful termination and breach of the collective
11 bargaining agreement claims. The arbitration award is valid
12 and enforceable, and I will not re-visit the same issues
13 decided in arbitration. Defendants' motions for summary
14 judgment on these claims are **GRANTED** and plaintiff's cross-
15 motion is **DENIED**.

16 On plaintiff's claim that the Union breached its duty of
17 fair representation, the court accords great deference to the
18 Union's judgment and discretion in handling grievances. For
19 the Union to breach its duty of fair representation, its
20 conduct must be arbitrary, discriminatory or in bad faith.
21 Vaca v. Sipes, 386 U.S. 171, 190 (1967). A union's "actions
22 are arbitrary only if, in light of the factual and legal
23 landscape at the time of the union's actions, the union's
24 behavior is so far outside a 'wide range of reasonableness,'
25 as to be irrational." Conkle v. Jeong, 73 F.3d 909, 915 (9th
26 Cir. 1995)(quoting Air Line Pilots Ass'n, Int'l v. O'Neill,
27 499 U.S. 65 (1991)). To demonstrate bad faith, plaintiff must
28 establish that the conduct of the Union was tainted by

1 improper prejudice or produce "substantial evidence of fraud,
2 deceitful action or dishonest conduct.'" Amalgamated Ass'n of
3 Street, Elec. Railway and Motor Coach Employees of America v.
4 Lockridge, 403 U.S. 274, 299 (1971). Plaintiff must also
5 establish a causal relationship between the Union's breach and
6 his harm. Acri v. Int'l Ass'n of Machinists & Aerospace
7 Workers, 781 F.2d 1393, 1397 (9th Cir. 1986).

8 There is no evidence in the record that the Union's
9 behavior was arbitrary, irrational or in bad faith. At the
10 March 2003 meeting, the Union president's presence seems to
11 have been a contributing reason why Kaiser did not take
12 disciplinary action against plaintiff. Hwang Decl., Exh. A,
13 page 369, Exh. 26. When plaintiff contacted Lam again on June
14 5, 2003 and Kaiser held a disciplinary meeting, vice president
15 and business representative Geoffrey Gamble attended, and
16 although he was not plaintiff's requested representative, he
17 negotiated the last chance agreement for the Union on behalf
18 of plaintiff. At plaintiff's request, Gamble successfully
19 advocated that any reference to plaintiff's improper service
20 of the NLRB charge be removed from the last chance agreement.
21 After the June 17, 2004 meeting, the Union signed and
22 processed plaintiff's grievance challenging the last chance
23 agreement and then later urged Kaiser to limit the last chance
24 agreement's term. Although unsuccessful in persuading Kaiser
25 to cancel or modify the last chance agreement, the Union's
26 conduct was not arbitrary, irrational or in bad faith. When
27 plaintiff contacted Lam by email after the funeral, the Union
28 again represented him. Shop Steward Whitehead accompanied

1 plaintiff to the termination meeting on February 24, 2003.
2 Gamble assisted him in preparing and grieving his termination
3 and represented plaintiff at a meeting the next day on
4 February 25, 2003 and again on March 8, 2003, arguing
5 plaintiff's case that the prior phone call to Lam that led to
6 the last chance agreement was work-related.

7 Plaintiff asserts that the Union breached its duty of
8 fair representation since Wiltz, who represented Lam,
9 requested that Kaiser discipline him. Wiltz, however, was
10 advocating for Lam as Lam's representative. At the March 2003
11 meeting, plaintiff's representative was the Union president
12 and at subsequent meetings, his representative was Gamble.
13 The Union owes a duty of fair representation to both plaintiff
14 and Lam, who is also a Union member, and the Union balanced
15 its duty to both by providing separate representatives for
16 each of plaintiff and Lam. Herring v. Delta Air Lines, Inc.,
17 894 F.2d 1020, 1023 (9th Cir. 1990)("[A union] must be able to
18 focus on the needs of its whole membership without undue fear
19 of law suits from individual members."). Wiltz' efforts to
20 adequately represent Lam did not violate the Union's duty of
21 fair representation to plaintiff.

22 Plaintiff claims, without evidence or support in the
23 record, that multiple alleged procedural violations in the
24 Union's preparation for and presentation of his grievances at
25 arbitration breached the duty of fair representation.

26 Plaintiff faults Gamble for failing to inform the arbitrator
27 about the arbitration procedures, by conceding that Kaiser
28 failed to have two Human Resources experts at his March 8,

1 2004 grievance meeting, by considering the October 2003
2 meeting to discuss the last chance agreement a compliance
3 meeting rather than a Level 1 grievance meeting, and by
4 telling him that there was no process for appealing the
5 arbitration. Plaintiff has not shown how any of Gamble's
6 actions harmed him. Plaintiff received the benefit of counsel
7 and had an opportunity to meet with his counsel prior to the
8 arbitration. He testified and explained what occurred from
9 his point of view. A reading of the arbitration transcript
10 reveals that plaintiff had a fair opportunity to present his
11 case. While plaintiff could have moved to vacate the
12 arbitration decision in a court, Gamble did not breach the
13 duty of fair representation by telling plaintiff that there
14 was no procedure under the collective bargaining agreement for
15 appealing arbitration decisions.

16 As for plaintiff's complaints about the arbitration
17 proceedings, he contends that the Union and Kaiser were in
18 violation of the collective bargaining agreement by soliciting
19 testimony and submitting documents from 2001 and 2002, but the
20 collective bargaining agreement merely prohibits the
21 introduction at arbitration of documents generated at Level 1
22 or 2 meetings. The parties may still submit, and the
23 arbitration panel may still consider, documents and testimony
24 from 2001 and 2002 which were not generated at Level 1 or 2
25 meetings. Evidence from 2001 and 2002, such as emails or
26 testimony about plaintiff's calls or voicemail messages,
27 showing what led to the last chance agreement, was admissible
28 at the arbitration. Next, plaintiff complains that his

1 grievance took too long to arbitrate, when there were few
2 other cases pending. Not only is this unsupported by the
3 evidence, but plaintiff has failed to show that the Union
4 harmed him by any delay, if there was one. Finally, plaintiff
5 argues that the Union breached its duty of fair representation
6 by failing to call Wiltz and Lam as witnesses at the
7 arbitration and failing to argue that Kaiser and the Union
8 breached the NLRA and retaliated against plaintiff for
9 bringing a charge with the NLRB. Plaintiff's claim fails
10 because the arbitration panel had no jurisdiction to hear
11 claims under the NLRA, and even if it did, a court will not
12 second-guess the Union's decision to withhold certain
13 arguments if it was based on reasoning. See Stevens v. Moore
14 Business Forms, 18 F.3d 1443, 1448 (9th Cir. 1994). The
15 record establishes that the Union did not call Wiltz and Lam
16 for rational, strategic reasons. Plaintiff does not
17 contradict Gamble's declaration that Wiltz' and Lam's
18 testimony would only have harmed plaintiff. Herring, 894 F.2d
19 at 1023 ("[A] union does not breach its duty of fair
20 representation to others as long as it proceeds on some
21 reasoned basis"). Therefore, plaintiff's claims that the
22 Union breached the duty of fair representation by not making
23 certain arguments or calling certain witnesses fail.

24 The Union is entitled to summary judgment because there
25 is no evidence that Wiltz, Gamble or the Union breached the
26 duty of fair representation by acting arbitrarily,
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1 irrationally or in bad faith.¹⁶ On plaintiff's claim for
2 breach of the duty of fair representation, defendants' motions
3 for summary judgment are **GRANTED** and plaintiff's cross-motion
4 is **DENIED**.¹⁷

5 Plaintiff next contends that the Union violated the
6 Labor-Management Reporting and Disclosure Act, 29 U.S.C. §
7 411(a)(2), by allegedly participating in Kaiser's decision to
8 discipline him, but it is undisputed that the Union did not
9 fine, suspend, expel or otherwise discipline plaintiff for
10 exercising his rights. 29 U.S.C. § 529; Finnegan v. Leu, 456
11 U.S. 431, 436 (1982). Plaintiff was a member in good standing
12 with the Union throughout his employment at Kaiser, and he has
13 not shown that the Union denied him any promotions or other
14 opportunities. Plaintiff seems to base his claim on the fact
15 that he was set apart and treated differently from others
16 because he had to sign the last chance agreement, but the
17 Union did not impose the agreement, and any discipline
18 represented by the last chance agreement was not "punishment
19 authorized by the union as a collective entity." Webster v.

21 ¹⁶ Plaintiff also contends that Wiltz' behavior toward
22 him was brusque, sometimes "angry" and "abrasive" but does not
23 point to evidence in the record to show that Wiltz' alleged
24 behavior rose to the level of the kind of arbitrariness,
discrimination or bad faith necessary to create a triable issue
as to whether the Union breached its duty of fair
representation.

25 ¹⁷ Because plaintiff's claim against the Union for
26 breach of the duty of fair representation is meritless, his
claim for breach of the collective bargaining agreement fails
27 as well. See Johnson v. United States Postal Service, 756 F.2d
1461, 1467 (9th Cir. 1985)(holding that "a cause of action for
28 breach of a collective bargaining agreement may not be
maintained if the union provided fair representation").

1 United Auto Workers, Local 51, 394 F.3d 436, 441 (6th Cir.
2 2005). Therefore, the Union is entitled to summary judgment
3 on this claim and plaintiff's cross-motion on this claim is
4 **DENIED**.

5 Plaintiff's remaining claims are unclear and seem to
6 involve the same facts and arguments underlying his claims
7 already pursued in Smalls Claims Court, arbitration and NLRB
8 proceedings. Plaintiff's Civil Rights Act, common law breach
9 of contract, breach of the covenant of good faith and fair
10 dealing, defamation, fraud and First Amendment claims also
11 fail.¹⁸ Plaintiff's defamation claim is barred by res
12 judicata, and his state law claims are pre-empted by the LMRA
13 and NLRA. These claims also fail on the merits, since there
14 is insufficient evidence for a reasonable jury to find for
15 plaintiff. Plaintiff has not alleged, much less shown, that
16 defendants discriminated against him on the basis of any
17 protected category under the Civil Rights Act. Similarly, the
18 record does not support plaintiff's defamation and fraud
19 claims. Plaintiff does not specify any defamatory remarks or
20 fraudulent actions by defendants which harmed him.¹⁹ To the
21

22 ¹⁸ In his opposition, plaintiff added new claims based
23 on the California constitution and California Civil Code §
24 52.1. Plaintiff may not add new claims at this point. Even if
25 the court were to allow him to do so, these claims would fail
26 because no reasonable jury could conclude based on these facts
and this record that any defendants violated plaintiff's free
speech rights or interfered with plaintiff's enjoyment of his
legal rights. Cal. Civ. Code § 52.1(j)(requiring a threat of
violence to support an action brought under this section).

27 ¹⁹ To establish fraud under California law, plaintiff
28 must show misrepresentation, scienter, intent to induce
reliance, justifiable reliance and resulting damage. Lazar v.
Superior Court, 12 Cal.4th 631, 638 (1996). Plaintiff has not

1 extent plaintiff's common law breach of contract and breach of
2 the covenant of good faith and fair dealing claims overlap
3 with plaintiff's retaliation and breach of the collective
4 bargaining agreement claims, these fail for the reasons stated
5 above. To the extent they involve plaintiff's arguments that
6 the last chance agreement was orally modified, they also fail
7 for the reasons stated above. Because Kaiser and the Union
8 are private actors, the First Amendment does not apply. See
9 Collins v. Womancare, 878 F.2d 1145, 1147 (9th Cir. 1989),
10 *cert. denied*, 493 U.S. 1056 (1990). Defendants' motions for
11 summary judgment on these claims are therefore **GRANTED** and
12 plaintiff's cross-motion on these claims is **DENIED**.

13 Because plaintiff has not satisfied his burden to present
14 evidence that would raise a genuine issue of material fact on
15 any of his claims, **IT IS HEREBY ORDERED** that defendants'
16 motions for summary judgment are **GRANTED** and plaintiff's
17 cross-motion for summary judgment is **DENIED**.

18 Dated: September 27, 2006

19 _____
20 Bernard Zimmerman
21 United States Magistrate Judge

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satisfied this standard.